Filed 1/14/09 In re Marr. of Durkee CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re the Marriage of DEBORAH JOANN and STEPHEN CHARLES DURKEE.	
DEBORAH JOANN DURKEE, Respondent, v. STEPHEN CHARLES DURKEE, Appellant.	C057967 (Super. Ct. No. 05FL07619)

Appellant Stephen Durkee appeals the trial court's denial of his motion for a new trial after the court granted respondent Deborah Durkee's application for an order of protection against him. An order denying a motion for new trial, however, is nonappealable. (*Rodriguez v. Barnett* (1959) 52 Cal.2d 154, 156.) Accordingly, the appeal is dismissed. Even if we were to liberally construe the notice of appeal and interpret appellant's notice as perfecting a valid appeal from the order of protection issued on September 7, 2007, appellant's claim would fail.

Appellant elected to proceed on an appendix. (Cal. Rules of Court, rule 8.124.) Thus, the appellate record does not include a reporter's transcript of the evidentiary hearing in this matter. This is referred to as a "judgment roll" appeal. (*Allen v. Toten* (1985) 172 Cal.App.3d 1079, 1082-1083 (*Allen*); *Krueger v. Bank of America* (1983) 145 Cal.App.3d 204, 207.)

The limited record we have establishes the following:

On December 13, 2006, respondent requested and received an ex parte temporary restraining order, protecting respondent and their children from appellant. The order also limited appellant's parenting time to supervised visitation, two days a month, four hours each day, and set the matter for hearing on January 3, 2007.

Appellant denied the allegations contained within respondent's request for a restraining order and moved to have the temporary orders vacated. On January 3, 2007, the court denied appellant's motion. Then, on March 6, 2007, the court ordered a Family Code section 3111 evaluation to be completed and extended the temporary orders.

On September 6, 2007, the parties presented evidence in support of and in opposition to respondent's request for an order of protection. At the conclusion of the evidentiary hearing, the trial court found respondent's emotional abuse claims were established by the evidence and issued an order of protection restraining appellant and protecting respondent and their children until September 6, 2012.

Appellant subsequently filed a motion for a new trial, claiming the trial court's finding of "[e]motional abuse" was insufficient to support an order of protection, and the trial court erred in "not allowing him to present the entire testimony of Patricia Riley including the contents and findings of her report." The court denied his motion and on January 18, 2008, appellant filed a notice of appeal.

DISCUSSION

On appeal, we must presume the trial court's judgment is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Thus, we must adopt all inferences in favor of the judgment, unless the record expressly contradicts them. (See *Brewer v. Simpson* (1960) 53 Cal.2d 567, 583.)

It is the burden of the party challenging a judgment to provide an adequate record to assess claims of error. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141.) An appellant must present an analysis of the facts and legal authority on each point made, and must support the analysis with appropriate citations to the material facts in the record. If an appellant fails to do so, the argument is forfeited. (*County of Solano v. Vallejo Redevelopment Agency* (1999) 75 Cal.App.4th 1262, 1274; *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.)

When an appeal is "on the judgment roll" (*Allen*, *supra*, 172 Cal.App.3d at pp. 1082-1083), we must conclusively presume evidence was presented that is sufficient to support the court's findings. (*Ehrler v. Ehrler* (1981) 126 Cal.App.3d 147, 154

(*Ehrler*).) Our review is limited to determining whether any error "appears on the face of the record." (*National Secretarial Service, Inc. v. Froehlich* (1989) 210 Cal.App.3d 510, 521; Cal. Rules of Court, rule 8.163.)

On the record in this appeal, we find no error.

Appellant claims the trial court erred in granting respondent an order of protection under the Domestic Violence Prevention Act (DVPA) (Fam. Code, § 6200 et seq.), based solely on a finding of "emotional abuse." Appellant reads the DVPA's definition of abuse too narrowly.

Under the DVPA, the court may issue a protective order if there is evidence of domestic violence against "[a] person with whom the respondent has had a child." (Fam. Code, § 6211, subd. (d).) Domestic violence includes "[i]ntentionally or recklessly [causing] or attempt[ing] to cause bodily injury," and "attacking, striking, stalking, threatening, [or] harassing" conduct. (Fam. Code, §§ 6203, 6211, 6320, 6340; *Conness v. Satram* (2004) 122 Cal.App.4th 197, 201-202.) "Thus, the requisite abuse need not be actual infliction of physical injury or assault." [Citation.] (*Conness*, *supra*, 122 Cal.App.4th at pp. 201-202.)

Here, the court found Respondent's "[e]motional abuse claims [were] established by evidence" and issued an order of protection as a result. On its face, this ruling is not unlawful under the DVPA, and without a reporter's transcript, we must assume the court's use of the term "[e]motional abuse" included one of the forms of emotional (*i.e.*, not physical)

abuse identified in the statute. (*Ehrler*, *supra*, 126 Cal.App.3d at p. 154.) Ergo, we find no error.

Appellant also claims the trial court erred in refusing to admit the Family Code section 3111 psychological evaluation prepared by Patricia Riley. Appellant's claim would fail on the merits for numerous reasons. First, and foremost, as appellant acknowledges, the ruling about which he complains is not included the record on appeal. Thus, the order is not reviewable on appeal. Second, even if we accepted appellant's statement that the trial court refused to admit the report, without a reporter's transcript, we must also presume evidence was presented that is sufficient to support the court's decision. (*Ehrler, supra,* 126 Cal.App.3d at p. 154.) Consequently, even if the matter were properly before this court, we find no error.

DISPOSITION

Appellant's appeal is dismissed. Appellant shall reimburse respondent for her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1)(2).)

DAVIS, J.

We concur:

BLEASE, Acting P. J.

MORRISON, J.